

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

Supreme Court, U. S.
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No. 77-1806

FORD MOTOR COMPANY
(CHICAGO STAMPING PLANT),

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL 588, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR PETITIONER, FORD MOTOR COMPANY

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., pp. A1-A17)¹ is reported at 571 F.2d 993. The Decision and

1. References designated "Pet. App." are to the Appendices of the Petition for a Writ of Certiorari. References designated "A." are to the printed Single Appendix.

Order of the National Labor Relations Board and the Decision of the Administrative Law Judge (Pet. App., pp. A18-A45) are reported at 230 NLRB 716.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1978 (Pet. App., pp. A47-A48). The petition for a writ of certiorari was filed on June 21, 1978, and was granted on October 10, 1978 (A. 100). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

The principal question presented is whether the prices of cafeteria and vending machine food that is made available to employees in an industrial manufacturing plant are "terms and conditions of employment" within the meaning of Section 8(d) of the National Labor Relations Act and therefore mandatory subjects of collective bargaining.

A subsidiary question is presented concerning food services provided employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. § 151, *et seq.*) are set forth in the Appendix, *infra*, pp. A1-A3).

STATEMENT

In May, 1976, the General Counsel of the National Labor Relations Board ("the Board") issued an unfair labor practice complaint against Petitioner, Ford Motor Company ("Ford") (A. 1-7). The complaint alleged that Ford had violated the National Labor Relations Act ("the Act") by refusing to bargain with Local 588, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("Local 588" or "the Union"), the charging party, concerning cafeteria and vending machine food prices and food services at Ford's Chicago Stamping Plant, and by refusing to supply information concerning food prices and food services at the plant.

On December 1, 1976, an Administrative Law Judge, after hearing, issued an opinion in which he recommended that the complaint against Ford be dismissed (Pet. App., p. A45). On July 11, 1977, a three-member panel of the Board reversed the Administrative Law Judge and held that Ford had committed the violations alleged in the complaint. The Board ordered Ford, *inter alia*, to bargain with Local 588 concerning changes in food prices and concerning food services and to supply it with information concerning these matters (Pet. App., pp. A26-A27).

On February 22, 1978, the Court of Appeals denied a petition for review filed by Ford and enforced the Board's order (Pet. App., p. A17).

I. THE FACTS

A. Food Services at Ford's Chicago Stamping Plant

Ford operates an automotive parts stamping plant in Chicago Heights, Illinois, where it employs approximately 3600 hourly-rated production and maintenance employees who are represented by the Union (A. 14, 16, 25). Within the plant, there are two air-conditioned cafeterias and five air-conditioned food vending areas, known as "coke cribs," for use by such employees (A. 20, 30).

In the larger of the two cafeterias, which seats between 400 and 500 persons, hot food is served from steam tables; beverages, hot and cold food, pastries, and candy can also be purchased from vending machines situated in the cafeteria (A. 20). This cafeteria is open for breakfast and during lunch periods and shift changes, but only vending machine food can be purchased during shift changes. A smaller cafeteria, which accommodates 40 to 50 persons, is open for two of the three lunch periods occurring during the day and evening shifts (A. 30). No steam table service is available in the latter cafeteria, but approximately 12 vending machines supply hot and cold sandwiches, beverages, stews, soups, spaghetti, pastry, ice cream, and candy. The coke cribs, which have a total seating capacity of 235 to 300 persons, and in which are situated vending machines similar to those in the small cafeteria, are scattered throughout the plant (A. 30).

Since 1967, the cafeterias and coke cribs have been serviced by independent food caterers; since 1970, ARA Services ("ARA"), an independent contractor, has performed this function pursuant to a written contract with Ford (A. 28, 93).

On each shift, employees have a 30-minute lunch period and may take two 22-minute rest periods (A. 17). Although they may do so, very few employees leave the plant during their lunch periods. (A. 20-21, 52). Employees are not permitted to leave the plant during their 22-minute rest periods (A. 40).

Employees are permitted to bring their own food into the plant (A. 42). They are allowed to store the food in their personal lockers in ventilated locker rooms; but they may not bring it to the plant floor (A. 20-21). Food brought into the plant by employees may be eaten in the cafeterias or in the coke cribs (A. 42).²

B. The Ford-ARA Relationship

Under the applicable agreement between Ford and ARA (Jt. Exh. 21; A. 34, 81-99), the latter manages and operates the cafeterias in the Chicago Stamping Plant, and installs, maintains, and services the plant's vending machines (Jt. Exh. 21; A. 34, 86-89). ARA provides all food, beverages, and materials for the food operations, as well as the necessary management and personnel (Jt. Exh. 21; A. 34, 86-89). Ford furnishes rent-free to ARA the necessary space and all equipment other than vending machines, maintains the space and equipment, and provides all utilities for the operations (Jt. Exh. 21; A. 34, 85-86). Ford, however, retains a right to inspect the machines and equipment to determine compliance with sanitary standards (Jt. Exh. 21; A. 34, 92).

The agreement obligates ARA to:

furnish products of quality in accordance with purchasing specifications that shall have been sub-

2. A witness for Local 588 testified that the area where employees' lockers are located is not air conditioned and, during the summer, becomes hot. This witness also testified that employees have complained about spoilage of food stored in their lockers. This testimony is discussed *infra*, pp. 31-34.

mitted to and approved by Ford, and in accordance with a price and portion list for such manual food service and vending machines that shall have been submitted to Ford and that shall be subject to review at the request of Ford or [ARA] (Jt. Exh. 21; A. 34, 86).

The agreement, subject to termination by either party on 60 day's notice, provides that Ford will reimburse ARA for its direct costs for the services provided, plus a surcharge equal to 9% of net receipts for administrative costs and service fees (Jt. Exh. 21; A. 34, 89, 93). If receipts exceed the reimbursable amounts, the excess is returned to Ford (Jt. Exh. 21; A. 34, 91). If receipts are less than costs plus the surcharge, Ford is required to subsidize ARA up to an annual amount not to exceed \$52,000 (Jt. Exh. 21; A. 34, 82).

In recent years, food operations have resulted in a loss; and Ford has made up annual losses to ARA (A. 34).

C. Bargaining Between Ford and the Union

Since approximately 1956, Ford and the International Union have negotiated a series of collective bargaining agreements, applicable nationally, and covering employees at various Ford plants (Pet. App., pp. A35-A36). The applicable national agreement was effective from November 1973 until September 1976 (Pet. App., p. A36).³ Ford and Local 588 have also negotiated a series of local agreements concerning local issues at the Chicago Stamping Plant (Pet. App., p. A36). The applicable local agreement ran from June 1974 until September 1976 (Pet. App., p. A36).

Ford has never bargained with either the International Union or with Local 588 concerning food prices.

³ The 1973-1976 national agreement between Ford and the International Union has not been reproduced in the printed Single Appendix. It is, however, included in the record certified to this Court.

Consequently, neither the contracts between Ford and the International Union nor the contracts between Ford and Local 588 in any way touch upon food prices (Pet. App., p. A36).

From time to time in the past, however, Ford and Local 588 have bargained and reached agreement on various aspects of in-plant food services. These agreements were evidenced by letters from Ford to Local 588 which were included in the local agreements. A letter dated October 29, 1967, and included in the 1970 local agreement, summarized discussions between Ford and the then-current caterer and stated that the caterer agreed to make a number of improvements in the food services, for example, by ensuring that adequate condiments, silverware, and utensils were available, by conducting a study of food services, and by providing for prompt servicing of vending machines in the event of a breakdown (Jt. Exh. 8; A. 22, 71-72).

The 1970 Local Agreement contained two other letters concerning food services. One, dated November 15, 1964, stated Ford's intent to install an "eating facility equipped with vending machines" in a new addition to the plant (Pet. App., p. A37). The other, dated December 11, 1970, stated that Ford would arrange for the smaller cafeteria to be open at the same time as the main cafeteria (Pet. App., p. A37).

The 1974 Local Agreement contains Ford's assurances to Local 588 that certain kinds of foods would be made available, that employees would be served "in a reasonable length of time through the main serving lines," and that arrangements would be made to ensure prompt servicing of malfunctioning vending machines (Jt. Exh. 7; A. 21, 69-70).

D. The Controversy Between Ford and Local 588

On or about February 6, 1976, ARA informed Ford that, effective February 9, 1976, it would increase the prices of certain food items sold in the cafeteria and vending areas (A. 31). On February 6, Ford advised Local 588 about the price increases, but did not specify the amounts (A. 31). Local 588 then requested Ford to delay the increases pending discussion of the matter; Ford, however, refused the request (A. 31). The price increases went into effect on February 9; most affected items were raised 5 cents and some were raised 10 cents (Pet. App., p. A. 39).

On February 13, Local 588, by letter, requested Ford to bargain about "prices and services in cafeteria and vending operations" (Jt. Exh. 13; A. 26, 74). Ford's reply, dated February 18, turned down Local 588's request, stating that "food prices and services are not a proper subject for negotiations" (Jt. Exh. 15; A. 26, 77).

On February 16, 1976, Local 588 began a boycott of the food service operations (A. 33). More than half of Local 588's members observed the boycott; most of such employees brought their lunches to the plant (A. 33, 58). The boycott continued until June 7, 1976, but did not result in a reduction of food prices (A. 50).

By letter dated March 23, 1976, Local 588 requested information from Ford concerning, among other things, Ford's maintenance responsibilities, its profits from food operations, its control of food prices, and its contractual relationship with ARA. The letter stated that the information was sought to administer existing contract provisions and to prepare for forthcoming negotiations (Jt. Exh. 14; A. 26, 75). On April 9, Ford rejected the request (A. 27).

II. THE BOARD'S DECISION AND ORDER

The Board, reversing its Administrative Law Judge, found that Ford had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with Local 588 about increases in food prices and about the food services provided its employees (Pet. App., pp. A23-24). In so finding, the Board adhered to its rulings in four prior cases⁴ that "in-plant food prices are a mandatory subject of bargaining" (Pet. App., p. 22). The Board stated, without further rationale, that despite the reversal of each of such earlier Board rulings by a United States Court of Appeals, "we adhere to our position that cafeteria and vending machine prices are a mandatory subject of bargaining" (Pet. App., p. A23).⁵ Characterizing the information requested by Local 588 as "relevant" to mandatory subjects of bargaining, the Board found further that Ford violated the Act by rejecting the Union's information request (Pet. App., pp. A24-A25).

The Board ordered Ford to bargain with Local 588, upon request, with respect to food services and any changes "now in effect or hereafter made or proposed" with respect to food prices; and, upon request, to supply Local 588 with information relating to its

4. *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), enforcement denied, 387 F.2d 542 (4th Cir. 1967); *McCall Corp.*, 172 NLRB 540 (1968), enforcement denied, 432 F.2d 187 (4th Cir. 1970); *Package Machinery Co.*, 191 NLRB 268 (1971), enforcement denied, 457 F.2d 936 (1st Cir. 1972); *Ladish Co.*, 219 NLRB 354 (1975), enforcement denied, 538 F.2d 1267 (7th Cir. 1976).

5. The Board rejected the reasoning of the Administrative Law Judge that the Courts of Appeals' decisions, coupled with the Board's failure to seek certiorari in the most recent of them, indicated that the Board had accepted the judicial view that in-plant food prices are not mandatory subjects of bargaining (Pet. App., pp. A23-24).

"part or role" in Ford's cafeteria and vending machine operations (Pet. App., p. A27).

III. THE COURT OF APPEALS' OPINION

The Court of Appeals, while acknowledging it was "dealing with a close question," enforced the Board's order, holding that in-plant cafeteria and vending machine food prices and services materially and significantly affect and have an impact upon terms and conditions of employment, and are, therefore, mandatory subjects of bargaining (Pet. App., pp. A13-A17). The Court viewed the question presented as one to be resolved by a factual analysis. On this basis, the Court distinguished this case from an earlier decision by another Seventh Circuit panel,⁶ and from decisions by the First and Fourth Circuits,⁷ all holding that the matter of in-plant cafeteria and vending machine prices is not a mandatory bargaining subject (Pet. App., pp. A11-17). Thus the Court regarded the following factors as controlling: Ford's retention of control over cafeteria and vending machine prices; Ford's ability to profit from food service operations; Ford's past bargaining with Local 588 over in-plant food services; the infeasibility of employees' bringing their own lunches to the plant; the boycott by Ford employees protesting Ford's action with respect to food prices and services; and the existence of but one union representing the plant employees (Pet. App., pp. A16-17).

Other than to refer to the matter in conclusionary language (Pet. App., p. A17), the Court did not

6. *N.L.R.B. v. Ladish Co.*, 538 F.2d 1267 (1976).

7. *N.L.R.B. v. Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *McCall Corp. v. N.L.R.B.*, 432 F.2d 187 (4th Cir. 1970); *Westinghouse Electric Corp. v. N.L.R.B.*, 387 F.2d 542 (4th Cir. 1967).

discuss the question of whether in-plant food services is a mandatory bargaining subject; nor did it address the question of whether Ford was legally obligated to comply with Local 588's request for information concerning food matters.

SUMMARY OF THE ARGUMENT

A. The principal question presented is whether in-plant cafeteria and vending machine prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, hence, mandatory subjects of bargaining. As established by decisions of this Court, Section 8(d) requires bargaining only as to those matters which have a significant or material effect on employees' terms and conditions of employment.

Prior to this case, in four cases, the courts of appeals uniformly rejected the Board's view that in-plant food prices are mandatory bargaining subjects. In all these cases, the courts regarded the matter as lacking sufficient significance to give rise to a bargaining obligation. Where the companies involved could not themselves establish food prices because the rendition of food services was performed by caterers, two of the courts pointed out the futility of requiring company-union bargaining; and even where the companies could set food prices or could affect them indirectly through the payment of subsidy to the caterer, the other two courts deemed such control not to be "significant." And in two such cases, where there existed a number of unions in the companies' plants with bargaining rights, the courts pointed out that mandatory bargaining with one such union would be disruptive of stable labor relations and economically wasteful.

As was also noted by two of the courts of appeals in the prior cases, the conclusion that in-plant food prices are not a mandatory subject is fully in accord with the legislative history of the Act. That history shows that Section 8(d)'s requirement of bargaining concerning "terms and conditions of employment" does not mandate bargaining of unlimited scope; nor does it require that employers and unions bargain over any subject which interests either of them. Instead, the section encompasses only a limited category of issues subject to compulsory bargaining.

The conclusion of the courts of appeal that bargaining about in-plant food prices is not mandatory also fulfills the Act's underlying purpose of ensuring and promoting industrial peace. Were bargaining to be required about food prices, which fluctuate frequently, employers and unions could be forced to endure endless rounds of bargaining negotiations; this could only be disruptive of industrial stability.

This Court has stated that compulsory bargaining is required only where the subject matter "vitally affects" the employees' terms and conditions of employment. In-plant food prices do not "vitally affect" employees' working conditions, and they are substantially different in kind and importance from matters held to be within the scope of the phrase "terms and conditions of employment." Furthermore, matters having substantially greater impact on employees than in-plant food prices have been held not to be mandatory bargaining subjects.

The conclusion that in-plant food prices are not mandatory bargaining subjects is supported by the fact that unions have available ample means of accommodating the effect of food prices on their membership, whether in the plant or elsewhere. Anticipated food price in-

creases are an element included in the periodic wage increases bargained by unions. Cost of living provisions, such as those Ford has negotiated with the International Union, also give employees protection against effects of food price changes.

Collective bargaining agreements are uniformly silent with respect to in-plant food prices, thus reflecting the fact that such prices are not considered appropriate subjects of collective bargaining.

Because in-plant food prices are not a mandatory subject of bargaining and the existing collective bargaining agreement did not touch upon food prices, Ford did not unlawfully refuse to provide information concerning food prices. The obligation to furnish information extends only to mandatory subjects and to information a union needs to enforce contractual provisions.

B. In an effort to distinguish this case from the earlier courts of appeals' decisions, the Court of Appeals relied on a number of "distinctions," all of which are either irrelevant or show the inappropriateness of bargaining. To base the obligation to bargain on the existence of such distinctions, separately or in combination, would produce great confusion and, perhaps, result in a substantial amount of litigation concerning whether the duty to bargain exists at particular plants.

That Ford might "influence prices" charged by the caterer is irrelevant, the basic inquiry being whether the food prices materially and significantly affect employees. Similarly, that Ford might possibly make a profit from the food service operations, that bargaining had occurred over food services, and that employees had boycotted the operations, all have no bearing on whether in-plant food prices have a significant or material effect on employees. Moreover, and contrary to

the Court of Appeals, Ford's role in food prices, which is limited to reviewing prices set by the caterers, shows that for Ford to bargain about food prices would not be meaningful because Ford cannot itself set food prices.

Furthermore, the Court of Appeals erroneously relied on the fact that Ford would be required to bargain with only one union. There should not be one rule for multi-union plants and a different rule for single union plants, although, of course, the existence of two or more unions in a plant makes bargaining over food prices all the more infeasible.

C. The Court of Appeals improperly enforced the Board's order that Ford bargain about "food services." The term "food services" was left undefined both by the Court of Appeals and by the Board, and nothing in the dealings between Ford and Local 588 lends meaning to the Board's order. Furthermore, the term "food services" obviously encompasses the most trifling aspects of a food service operation which can in no way be said to have a significant or material effect on employee working conditions.

ARGUMENT

I. IN-PLANT CAFETERIA AND VENDING MACHINE FOOD PRICES ARE NOT "TERMS AND CONDITIONS OF EMPLOYMENT" WITHIN THE MEANING OF SECTION 8(d) OF THE ACT.

The decision below that in-plant food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, a subject about which bargaining is required by Section 8(a)(5) is contrary to applicable legal principles and inconsistent with decided case authority and the legislative history of the Act. Moreover, bargaining about

in-plant food prices would be disruptive of industrial stability because it could force employers and unions to endure repeated rounds of negotiation by bargaining each time those prices were to be changed as a result of the frequent fluctuations in the price of various food products. The disruption that would thus result is wholly unnecessary since periodic wage negotiations between employers and unions and collectively bargained cost of living provisions provide ample means for accommodating the impact of food price increases on employees.

A. Prior Decisions of the Courts of Appeals Confirm That In-Plant Food Prices Are Not Appropriate Subjects of Mandatory Bargaining.

The question of whether in-plant food prices are "terms and conditions of employment" within the meaning of Section 8(d) of the Act and, therefore, a subject about which bargaining is required by Section 8(a)(5) of the Act,⁸ is not novel. Prior to the decision below, this question had been considered by courts of appeals on four separate occasions, including once by the Seventh Circuit, and on each occasion the court rejected the Board's view that bargaining was required regardless of the surrounding factual circumstances.⁹

8. An employer or a union may insist to impasse on its position on a mandatory subject. *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

9. The Board's decisions have been premised on a variety of shifting rationales and have been marked by vigorous dissents. In the earliest case, *Westinghouse Electric Corp.*, 156 NLRB 1080 (1966), the Board held, with two members dissenting, that bargaining was required. The majority asserted that the employer had cafeteria facilities on its premises because nearby restaurant facilities were inadequate and hence, without dining facilities, the employer would be unable to attract employees. 156 NLRB at 1081. That employees could bring their lunches to work with them,

(Footnote continued on next page)

In the first case, *Westinghouse Electric Corp. v. N.L.R.B.*, 387 F.2d 542 (1967), the Fourth Circuit, sitting *en banc*, held that collective bargaining was not required concerning price increases in food items established by an independent contractor that operated cafeterias in the employer's plant. The Court rejected the Board's contention concerning the scope of Section 8(d), pointing out that since practically every man-

(Footnote continued from preceding page.)

the Board majority deemed irrelevant, because "[t]he fact is that a considerable number of employees do not wish to bring their lunches from home" and were therefore "in substance and effect captive customers." 156 NLRB at 1081. Nevertheless, noting that the constant and frequently sharp fluctuation in the cost of food ingredients, the large number of individual items sold, and changes in menus made it impracticable to require consultation with a union before each change in the price of any product sold, the Board majority modified the Trial Examiner's proposed order that the employer bargain with the union *before* prices were changed and ordered bargaining *after* price changes had been made. 156 NLRB at 1081.

The dissenting Board members in *Westinghouse* noted that there were three unions in the plant and stated that "bargaining over the prices on each item of the menu by each of the three unions has the potential for extensive preemption of management and employee time." They further noted that there was no compulsion for the employees to buy their lunches in the cafeteria, and would, therefore, have left the matter of food price increases to "the voluntary action of the market place." 156 NLRB at 1083.

In *McCall Corp.*, 172 NLRB 540 (1968), the Board adopted, *pro forma*, the Trial Examiner's decision, which relied on the Board's decision in *Westinghouse*. Because enforcement of *Westinghouse* had already been denied by the Fourth Circuit, the Trial Examiner also distinguished *Westinghouse* on the ground that in the case before him the company could set food prices while in *Westinghouse* prices were set by an independent contractor. 172 NLRB at 545. Subsequently, in *Package Machinery Co.*, 191 NLRB 268 (1971), the Board adopted, again *pro forma*, the Trial Examiner's brief decision in which he found the Board's decisions in *Westinghouse* and *McCall* to be controlling.

Ladish Co., 219 NLRB 354 (1975), was decided by a two-to-one vote of a three-member Board panel. The members in the majority asserted that in-plant eating facilities served "significant management needs" by boosting morale, by increasing efficiency and pro-

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terial decision has some impact on wages, hours, or other conditions of employment, the "determination of which decisions are mandatory bargaining subjects must depend upon whether a given subject has a significant or material relationship" to these matters. 387 F.2d at 548. The Court then said (387 F.2d at 548, 550):

The case before us does not even remotely involve any question of job security or any other issue which employees could traditionally consider "vital". . . .

* * *

[I]t was not the intent of Congress in enacting the National Labor Relations Act to sweep every act by every employer within the ambit of "conditions of employment" . . . [E]quating the trifles here involved with subjects such as wages, hours, working conditions, job security, pensions, insurance, choice of bargaining representatives or other subjects directly and materially affecting "conditions of employment" is sheer nonsense.... Balanced and effective collective bargaining should be the ultimate objective. The statutory purpose may best be served by formulating and applying a reasonable concept of "conditions of

(Footnote continued from preceding page.)

ductivity, and by aiding in recruiting employees. 217 NLRB at 357. They emphasized the unavailability of alternative eating facilities, and stated that because the employer could terminate its contract with the caterer which set the food prices, bargaining would not be futile. 217 NLRB at 358, 360.

The dissenting Board member in *Ladish* noted that the only control the company had over food prices was its ability to terminate its contract with the caterer. He viewed this power as an ineffective mechanism for providing the company with the necessary leverage to control the caterer's food prices. Consequently, he regarded a bargaining order to be, in effect, an order for the company "to perform a futile act." 219 NLRB at 361. He further viewed a bargaining order with respect to food prices as requiring "meaningless and repetitive negotiations" because of the presence in the plant of seven labor organizations, only one of which was the beneficiary of the Board's bargaining order. 219 NLRB at 361-362.

employment" in determining subjects of mandatory bargaining.

Further, the Court noted, to require bargaining about food prices would place the company in an "unfair and unenviable" position and could lead to "disagreement, dissatisfaction, strife and turmoil," because the union which had sought the bargaining order represented only about one third of the employer's employees, the remaining employees being either unrepresented or represented by two other unions. 387 F.2d at 549-550.

Finally, the Court in *Westinghouse* pointed out that because the company could not make an "enforceable contract" to change food prices, as such prices were set by the caterer and not the company, to order the latter to bargain about prices was tantamount to ordering the company "to engage in talk for the sake of going through the motions."¹⁰ The Court characterized such bargaining as "fictional bargaining," noting that the purpose of collective bargaining is "to produce an agreement." 387 F.2d at 550.

In a subsequent case, *McCall Corp. v. N.L.R.B.*, 432 F.2d 187 (1970), the Fourth Circuit adhered to its *Westinghouse* decision and held that bargaining was not required even though the employer supplied the food and fixed the food prices. That the company could directly control the quality and prices of the food was deemed by the Court "not of sufficient significance to affect the result." 432 F.2d at 188.

10. In *Westinghouse*, the caterer fixed the prices subject to a contractual provision that the "quality and prices of the meals served and the hours of service thereof in said cafeteria shall at all times be reasonable." The company could enforce this provision by unilaterally terminating the contract on sixty days written notice. See *McCall Corporation v. N.L.R.B.*, 432 F.2d 187, 188 (4th Cir. 1970). Thus, in *Westinghouse*, as here, the employer alone did not control food prices.

The First Circuit in *N.L.R.B. v. Package Machinery Co.*, 457 F.2d 936 (1972), followed the Fourth Circuit decisions. There, the company utilized an independent caterer to provide food and vending machine services. The company subsidized the caterer's operations. The Court refused to enforce the Board's order requiring bargaining over the amount of the company's subsidy, saying (457 F.2d at 938):

All [the Board] has is a demand from a union that the Company should contribute to the expenses of lunch or snacks for those who do not wish to bring their lunch from home, or to take the trouble to drive to a nearby restaurant. If food costs go up from time to time, as inevitably they seem to, it would appear more appropriate to bargain over wages, particularly when half of the employees do not use the company restaurant.

In *N.L.R.B. v. Ladish Co.*, 538 F.2d 1267 (1976),¹¹ the Seventh Circuit reached the same conclusion as had the First and Fourth Circuits. In *Ladish*, food was sold from in-plant vending machines owned and maintained by outside contractors. The contractors fixed the food prices. The company received a commission on the food items sold as reimbursement for providing the space, electricity and water needed to operate the machines. The company's control over prices was limited to persuasion and its ability to replace the contractor.

The majority of the company's employees in *Ladish* received a 15-minute paid lunch period. During the paid lunch period, the employees were not permitted to leave the plant. Approximately 70 percent of the employees in the charging union purchased their lunches from the vending machines; the remaining 30

11. *Ladish* and this case were decided by different panels of the Seventh Circuit.

percent brought their lunches to work. Ninety percent of the employees in the charging union utilized the vending machines for their beverages. Seven unions, including the charging union, represented the company's 4,800 employees.

The Court in *Ladish*, quoting from the Ninth Circuit's decision in *Seattle First National Bank v. N.L.R.B.*, 444 F.2d 30, 32-33 (1971), stated that the phrase "terms and conditions of employment" does not include every matter that might be of interest to unions or employers, but instead was limited to those matters which "materially or significantly affect terms or conditions of employment." 538 F.2d at 1269-1270. In the Court's view, vending machine prices did not so qualify. In so concluding, the Court stated that the company's power to terminate the vending machine contracts did not give the company effective power over the prices charged, and that bringing one's own lunch to the plant, or "brown bagging," was a "viable alternative" to commercial food service. 538 F.2d at 1271. Furthermore, the Court noted, because of the presence of several unions in the plant, to require bargaining "could be both disruptive of stable employee relations and economically wasteful," for the company could be compelled to engage in several rounds of negotiations and, at best, could only agree to negotiate with the vending machine owners. 538 F.2d at 1272.

In sum, prior to the decision below and in a wide variety of factual circumstances, the courts of appeals uniformly took the position that a change in in-plant food prices is not a mandatory bargaining subject. The courts regarded the matter as too insignificant to give rise to a bargaining obligation. Where, as in *Westinghouse* and *Ladish*, and like the situation in this case,

the companies could not themselves establish food prices, the courts pointed out the futility of requiring company-union bargaining; and even where, as in *McCall* and *Package Machinery*, the companies could either set food prices directly or could affect them indirectly through the payment of a subsidy to the caterer, the courts regarded such control as not "significant." The court in *Package Machinery* pointed out that whatever effect food price increases had on employees could best be accommodated through bargaining over wages. Similarly, in *Westinghouse* and *Ladish*, where a number of unions in the companies' plants exercised bargaining rights—a fact which mirrors the actual reality in numerous industrial plants and other kinds of employing entities throughout the United States—the courts pointed out that mandatory bargaining with any one such union would be both disruptive of stable labor relations and economically wasteful.

B. Legislative History Likewise Shows That Bargaining Over In-Plant Food Prices Is Not Required

As pointed out in *Westinghouse*, 381 F.2d at 546-547, and in *Ladish*, 538 F.2d at 1272, not to require bargaining about in-plant food prices is fully consistent with the relevant legislative history of Section 8(d) of the Act—history which makes it plain that not every matter which touches upon the employment relationship is a "term and condition of employment."

As originally enacted, the Wagner Act set forth no definition of the duty to bargain collectively. See *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 220 (1964). In the 1947 revision of that Act, the House bill contained a detailed list of mandatory bargaining subjects, which did not include in-plant food prices or

services, and confined the duty to bargain to the subjects listed.¹² In the Senate, the House bill was amended, but the Senate's amendment did not set forth a definition of collective bargaining.¹³ In conference between the House and Senate, the specific listing in the House bill was dropped, the Senate version was accepted, and the present language of Section 8(d) was substituted. However, the accompanying Conference Report shows that the intent of the Congress was to retain the restrictive approach of the House bill. Thus the Report stated with respect to the Senate version, and therefore with respect to the present Section 8(d), that while "this section did not prescribe a purely objective test of what constituted collective bargaining as did the House Bill, [it] had to a very substantial extent the same effect...."¹⁴

The relevant legislative history thus shows that Section 8(d)'s requirement of bargaining concerning "terms and conditions of employment" does not mandate bargaining of unlimited scope. In *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. at 220, Mr. Justice Stewart, referring to this legislative history, thus summed up the governing principle:

12. The House bill listed the following as mandatory bargaining subjects:

- (i) Wage rates, hours of employment and work requirements;
- (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit;
- (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment;
- (iv) vacations and leaves of absence; and
- (v) administrative and procedural provisions relating to the foregoing subjects. (H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11) (B)(vi) (1947), in 1 Legislative History of the Labor Management Relations Act, 1947, at 166-167 (G.P.O. 1948)) (hereinafter cited as "Leg. Hist.").

13. See 1 Leg. Hist. at 242-243.

14. 1 Leg. Hist. at 538.

. . . the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act.

In prior cases, this Court has applied the latter principle by conducting a careful inquiry in each case to ascertain whether a specific subject ought to be considered a "term and condition of employment." See, for example, *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959); and *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971) where it was stated that "in each case the question [is] whether [the subject at issue] vitally affects the 'terms and conditions' of [the employees'] employment."

C. In-Plant Food Prices Do Not "Vitally" Affect Employees' Working Conditions

In-plant food prices are substantially different in kind and importance from matters previously held to be within the scope of the phrase "terms and conditions of employment." These matters include: grievance and arbitration procedures;¹⁵ layoffs;¹⁶ dis-

15. *Bethlehem Steel Co.*, 136 NLRB 1500, enforcement denied on other grounds, 320 F.2d 615 (3d Cir. 1963); *Crown Coach Corp.*, 155 NLRB 625 (1965); *N.L.R.B. v. Boss Mfg. Co.*, 118 F.2d 187 (7th Cir. 1941); *N.L.R.B. v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

16. *U.S. Gypsum Co.*, 94 NLRB 112 (1951), modified, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912 (1954).

charge;¹⁷ workloads;¹⁸ vacations;¹⁹ holidays;²⁰ sick leave;²¹ use of bulletin boards by unions;²² change of payment from a salary base to an hourly base;²³ definition of bargaining unit work;²⁴ performance of bargaining unit work by supervisors;²⁵ seniority, promotions, and transfers;²⁶ compulsory retirement age;²⁷ union shop, checkoff, agency shop, and hiring hall;²⁸

17. See *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940); *N.L.R.B. v. Bachelder*, 120 F.2d 574 (7th Cir.), cert. denied, 314 U.S. 647 (1941).

18. *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953 (1958); *Irvington Motors, Inc.*, 147 NLRB 565 (1964), enforced, 343 F.2d 759 (3d Cir.), cert. denied, 382 U.S. 832 (1965).

19. *Great Southern Trucking Co. v. N.L.R.B.*, 127 F.2d 180 (4th Cir.), cert. denied, 317 U.S. 652 (1942).

20. *N.L.R.B. v. Sharon Hats, Inc.*, 289 F.2d 628 (5th Cir. 1961); *N.L.R.B. v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); *Instrument Div., Rockwell Register Corp.*, 142 NLRB 634 (1963).

21. *N.L.R.B. v. Katz*, 369 U.S. 736 (1962).

22. *N.L.R.B. v. Proof Co.*, 242 F.2d 560 (7th Cir.), cert. denied, 355 U.S. 831 (1957).

23. *General Motors Corp.*, 59 NLRB 1143 (1944), modified, 150 F.2d 201 (3d Cir. 1945).

24. *Almeida Bus Lines, Inc.*, 142 NLRB 445 (1963), enforcement denied, 333 F.2d 729 (1st Cir. 1964).

25. *Crown Coach Corp.*, 155 NLRB 625 (1965).

26. *U.S. Gypsum Co.*, 94 NLRB 112 (1951), modified, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912 (1954); *Oliver Corp.*, 162 NLRB 813 (1967); *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), enforced, 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966); *N.L.R.B. v. Proof Co.*, 242 F.2d 560 (7th Cir.), cert. denied, 355 U.S. 831 (1957); *N.L.R.B. v. Katz*, 369 U.S. 736 (1962); *Marine & Shipbuilding Workers v. N.L.R.B.*, 320 F.2d 615 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

27. *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949).

28. *N.L.R.B. v. Andrew Jergens Co.*, 175 F.2d 130 (9th Cir.), cert. den., 338 U.S. 827 (1949); *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734 (1963); *Houston Chapter, Associated Gen. Contractors*, 143 NLRB 409 (1963), enforced, 349 F.2d 449 (5th Cir. 1965), cert. den., 382 U.S. 1026 (1966).

plant rules;²⁹ no-strike clauses;³⁰ subcontracting;³¹ and employee safety.³²

In contrast, in-plant food prices do not have the impact on employees as do such matters as the foregoing. Furthermore, matters having substantially greater impact on employees than in-plant food prices have been held *not* to be mandatory subjects of bargaining. Such nonmandatory subjects include: the pension benefits of retired employees;³³ fining employees who cross a picket line during a strike;³⁴ whether a contract will cover supervisors;³⁵ "interest arbitration";³⁶ performance bonds guaranteeing payment of employees' wages³⁷ or securing contract performance;³⁸ the requirement of a strike vote before a

29. *Murphy Diesel Co. v. N.L.R.B.*, 454 F.2d 303 (7th Cir. 1971); *NFL Players Ass'n v. N.L.R.B.*, 503 F.2d 12 (8th Cir. 1974); *Colonial Press, Inc.*, 204 NLRB 852 (1973); *Medicenter, Mid-South Hosp.*, 221 NLRB 670 (1975).

30. *Shell Oil Co.*, 77 NLRB 1306 (1948).

31. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964).

32. *N.L.R.B. v. Gulf Power Co.*, 384 F.2d 822, 824 (5th Cir. 1967).

33. *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

34. *Universal Oil Products Corp. v. N.L.R.B.*, 445 F.2d 155 (7th Cir. 1971).

35. *N.L.R.B. v. Retail Clerks Int'l Ass'n*, 203 F.2d 165 (9th Cir. 1953), aff'd on rehearing, 211 F.2d 759 (9th Cir.), cert. denied, 348 U.S. 839 (1954); *Southern California Pipe Trades District Council 16*, 167 NLRB 1004 (1967).

36. *N.L.R.B. v. Columbus Printing Pressmen*, 543 F.2d 1611 (5th Cir. 1976); *Sheet Metal Workers, Local 59*, 227 NLRB 520 (1976).

37. *Lathers, Local 42*, 223 NLRB 37 (1976).

38. *Local 164, Brotherhood of Painters v. N.L.R.B.*, 293 F.2d 133 (D.C. Cir.), cert. denied, 368 U.S. 824 (1961).

strike;³⁹ the requirement of employee ratification of an agreement;⁴⁰ permission to use a union label;⁴¹ contributions to industry promotion funds;⁴² a compulsory code of ethics for employees with accompanying penalty provisions.⁴³

An employee who purchases food from a cafeteria or vending machine located at the place of his or her employment is in essentially the same position as the employee who purchases food in a nearby public restaurant. In-plant food prices are thus at most only incidentally involved in the employment relationship and have, as the courts of appeals previously determined, at most only an insubstantial impact on employees. That this is so is borne out by the fact that part of the context of bargaining is expected increases or decreases in the various constituent parts of the employees' cost of living, which includes such items as housing, medical expenses, transportation, and food, whether it is procured in or outside the work place. See *Wage and Price Standards*, 43 Fed. Reg. 51938, 51940 (November 7, 1978); P. Samuelson, *Economics*, pp. 564-565 (8th Ed.). In addition, many collective bargaining agreements, including that between Ford and the International Union,⁴⁴ provide for cost-of-living adjustments tied to the Consumer Price Index,

39. *N.L.R.B. v. Wooster Division of Borg Warner Corp.*, 356 U.S. 342 (1958).

40. *Houchens Market of Elizabeth Town, Inc. v. N.L.R.B.*, 375 F.2d 208 (6th Cir. 1967).

41. *Kit Mfg. Co.*, 150 NLRB 662 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966).

42. *Detroit Resilient Floor Decorators, Local 2265*, 136 NLRB 769 (1962), *enforced*, 317 F.2d 269 (6th Cir. 1963).

43. *Capital Times Co.*, 223 NLRB 651 (1976).

44. See pp. 93-97 of the 1973-1976 national agreement between Ford and International UAW, which as stated *supra*, n. 3., is part of the record before the Court in this case.

which includes food prices as one of its key components. Thus, the impact on employees of any single, or even overall, food price increase occurring in connection with in-plant feeding becomes of no greater consequence than the cost of food outside the plant.

Moreover, excluding in-plant food prices from Section 8(d) is perfectly consistent with a basic purpose underlying the Act. As the Court has often stated, and as Section 1 of the Act makes clear,⁴⁵ the Act was designed and intended to preserve and promote industrial peace and stability and to avoid labor strife. See, for example, *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1938), and *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 401 (1952), the latter of which also teaches that whether a specific matter is a mandatory bargaining subject is to be measured, in part, by reference to this purpose. And that purpose would clearly be contravened, we submit, by a requirement that bargaining about in-plant food prices be mandatory. Frequent and sometimes extreme

45. Section 1 of the Act provides in pertinent part:

... Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

price fluctuations occur with respect to the cost of basic food items. See Handbook of Labor Statistics, 1975 Reference Edition, U.S. Department of Labor, Bureau of Labor Statistics (1975), Table 127; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1975, Table 23, pp. 96-97; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1976, Table 23, pp. 82-83; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, December, 1977, Table 23, pp. 100-101; Monthly Labor Review, U.S. Department of Labor, Bureau of Labor Statistics, October, 1978, Table 23, pp. 85-87.⁴⁶

Given these economic circumstances, to require bargaining about in-plant food price increases would require employers and unions to engage in repeated and, indeed, endless rounds of negotiations. Moreover, and somewhat startlingly, if the employer is to fulfill his statutory duty, bargaining would also be required, on request, even where prices are to be decreased. Such bargaining, exposing the parties on a repeated basis to the pressures, distractions and, possibly, animosity in the bargaining process would be counter-productive insofar as industrial peace is concerned.⁴⁷

46. Food price statistics for the five months preceding the price increase, based on 1967 as 100, are:

	September 1975	October 1975	November 1975	December 1975	January 1976
Cereals and bakery products	182.1	181.4	182.1	182.6	182.0
Meats, poultry, and fish	188.2	192.5	193.3	193.3	188.6
Dairy products	157.1	160.2	163.0	164.8	167.7
Fruits and vegetables	172.0	172.8	173.9	179.5	177.2
Other foods at home	181.0	181.2	182.3	184.4	183.4

47. The Board's order, which requires bargaining after a price increase, in no way avoids these concerns. Bargaining on a regular basis would still be mandated.

Finally, we point out that the conclusion that in-plant food prices should not be a mandatory bargaining subject is supported by the fact that bargaining over such matters is not a general or accepted labor-management practice. Neither the Court of Appeals nor the Board cited any evidence to show that employers and unions customarily bargain over in-plant food prices. There is no history of such bargaining in this case. Furthermore, in the standard reference collection of labor-management agreements, *Collective Bargaining (Negotiations and Contracts)*, BNA, not a single contract of the many there reproduced or summarized contains a provision either setting in-plant food prices or establishing a procedure for bargaining about such prices.

In sum, then, the Board's position that in-plant food prices are a mandatory bargaining subject was quite properly rejected by the courts of appeals which considered the issue prior to the decision below.⁴⁸

II. THERE ARE NO FACTUAL CIRCUMSTANCES PECULIAR TO THIS CASE REQUIRING A BARGAINING ORDER WITH RESPECT TO IN-PLANT CAFETERIA AND VENDING MACHINE FOOD PRICES.

The Court of Appeals, in an effort to distinguish this case from the earlier court decisions, relied upon a number of "distinctions" which, it said, mandated bargaining. See Pet. App., pp. A14-17. Close examination

48. As the duty to furnish information extends only to mandatory bargaining subjects and to information necessary to permit a union to discharge its representative role, and if bargaining is not mandatory with respect to in-plant food prices, it necessarily follows that Ford did not violate the Act by refusing to comply with Local 588's request for information concerning such prices. See *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432 (1967); *N.L.R.B. v. Package Machinery Co.*, 457 F.2d 936 (1st Cir. 1972); *San Diego Newspaper Guild v. N.L.R.B.*, 548 F.2d 863 (9th Cir. 1977); *International Telephone & Telegraph Co. v. N.L.R.B.*, 382 F.2d 366 (3d Cir. 1967), cert. denied, 389 U.S. 1039 (1968).

tion of these distinctions, however, demonstrates that they are either irrelevant to the issue of whether food prices are "terms and conditions of employment" or show the inappropriateness of bargaining over them. Furthermore, to base the obligation to bargain on such distinctions, each of which is discussed below, would produce great confusion and, perhaps, result in a substantial amount of litigation concerning whether the duty to bargain exists at particular plants.

1. *Influence over prices:* The Court of Appeals adopted the Board's statement that Ford "retains influence over cafeteria and vending machine prices by its right to review prices and its leverage of the subsidy agreement" (Pet. App., p. A16). However, the "influence" an employer retains over food prices has properly been regarded as irrelevant by the courts of appeals in the prior decisions. Thus in *McCall Corp. v. N.L.R.B.*, 432 F.2d at 188, the company supplied the food and in fact established food prices. Similarly, in both *Westinghouse Electric Corp. v. N.L.R.B.*, 387 F.2d at 544, and *N.L.R.B. v. Package Machinery Co.*, 457 F.2d at 937, the companies subsidized food operations by providing rent-free space and equipment or cash.

We submit that the manner in which in-plant food prices are set should not be determinative under Section 8(d). Instead, the basic inquiry is, as explicated above, whether such prices materially and significantly affect employees' working conditions. Accordingly, in the absence of a showing of such an effect, the peculiarities of the particular agreement under which food is provided are clearly irrelevant.

Moreover, Ford lacked the power to establish food prices. See *supra*, pp. 5-6. Ford could not have made a binding agreement with Local 588 concerning specific food prices; and, as the Fourth Circuit observed in

Westinghouse, supra, 387 F.2d at 550, in such circumstances the Act does not require "fictional bargaining." See also, *N.L.R.B. v. Insurance Agents International Union*, 361 U.S. 477, 485 (1960).

2. *Possibility of profit:* The Court of Appeals also adopted the Board's view that it was significant that there existed "the possibility" for Ford to make a profit from the food operations (Pet. App., p. A16). Again, however, the question is the effect on employees; and whether or not Ford makes a profit is not relevant to that question. The Fourth Circuit so determined in *McCall Corp. v. N.L.R.B.*, 432 F.2d at 188, where the company had "direct control" over food prices, thus establishing that the making of a profit was a definite possibility. Furthermore, the fact is that Ford has not made a profit on the in-plant food service operations and, indeed, has been forced to subsidize those operations. See *supra*, p. 6.

3. *Prior Bargaining:* The prior bargaining between the parties over aspects of food services operation *other than food prices*, a factor relied upon by the Court of Appeals, is simply not relevant to whether Ford must bargain about prices. Furthermore, it flies in the face of this Court's holding in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. at 187 (1971), that "[b]y once bargaining and agreeing on a permissive subject, the parties . . . do not make the subject a mandatory topic of future bargaining." Thus, Ford's prior bargaining with Local 588 cannot, as a matter of law, serve to distinguish this case meaningfully.

4. *Lack of a viable alternative:* The Court of Appeals adopted the Board's conclusion that there was no "viable alternative," such as "brown bagging," to purchasing food in-plant. The record, how-

ever, lacks substantial evidence to support the Board's conclusion in this respect. For the uncontradicted record evidence shows that not only are there alternative means present in the plant, but the employees have in fact utilized those means. The record evidence regarding use of the cafeteria shows that, on the average, only about 20 to 30 percent of the employees purchase food from the cafeteria each day (Pet. App., p. A3). Thus, aside from purchases from the vending machines, those who do not do so either bring their lunches, as presumably most do, or do not choose to eat, or go outside the plant for food. Moreover, during the boycott of the in-plant food services, almost all employees brought their lunches with them, see *supra*, p. 8, or were able to obtain food from other sources. In sum, the evidence shows that it is possible for employees to bring their lunches and that many did so.

The Court of Appeals, however, accepted the Board's conclusion that testimony concerning employee complaints about food spoilage and locker room temperatures in hot weather showed that the employees had no viable alternative to purchasing food from the cafeteria or vending machines (Pet. App., pp. A16, A23).⁴⁹ Such testimony was, however, clearly hearsay.⁵⁰ Because of his disposition of the case, see

49. It is obvious, however, that if food spoilage is indeed a problem in hot weather, employees could nevertheless avoid spoilage by not bringing foods that are likely to spoil and by storing the foods they bring in thermos bottles and similar containers.

50. This testimony was as follows:

Q. Concerning the possibility of spoilage of food, Mr. Marco, have you as Union Officer received complaints, any complaints, of actual food spoilage from unit employees?

A. Yes, I have.

MR. ROONEY: Objection, Your Honor. That is all hearsay.

MR. SCHUR: It's not offered, Your Honor, necessarily to prove—

(Footnote continued on next page)

Pet. App., pp. A43-45, the Administrative Law Judge did not consider the weight or significance of this testimony; nor did the Board or the Court of Appeals, even though they apparently relied on it. The testimony stands, moreover, totally uncorroborated, and it is flatly contradicted by other evidence showing that employees had other means of obtaining food both during and after the boycott. The testimony, therefore, cannot provide substantial evidence to sustain the conclusion that alternative food sources were lacking. As this Court said in *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 230 (1938): "Mere uncorroborated hear-

(Footnote continued from preceding page.)

JUDGE WINKLER: It really is. On the other hand, I will take it, even though technically I see the point of your objection.

THE WITNESS: Yes, I have received complaints of spoilage, people bringing their lunch. (A. 49)

* * *

Q. (By Mr. Dube) Have you received complaints from bargaining unit employees about the locker room other than the things you have mentioned, heat and humidity?

A. We have gotten numerous complaints about cockroaches in the lockers.

Q. Have you ever seen cockroaches in the lockers yourself?
A. Yes, I have.

Q. Do you know in those cases if any food was damaged or destroyed by cockroaches?

A. Well, I recall a particular day when I went into the hourly cafeteria and sat down with four people in the lunch room, and of the four people, two of them told me they had to just throw their lunch away because when they opened their dinner bucket they found a cockroach in there.

MR. ROONEY: I object, Your Honor, to that. It's really hearsay and proves nothing.

JUDGE WINKLER: Sustained (A. 54-55).

Section 10(b) of the Act, 29 U.S.C. Section 159(b), provides that unfair labor practice proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . ." The testimony relied upon by the Board and the Court of Appeals is hearsay under Rule 801 and inadmissible under Rule 802 of the Federal Rules of Evidence, none of the exceptions contained in Rule 803 being applicable.

say or rumor does not constitute substantial evidence." See also, *N.L.R.B. v. Lowell Sun Publishing Co.*, 320 F.2d 835 (1st Cir. 1963); *Boyle's Famous Corned Beef Co. v. N.L.R.B.*, 400 F.2d 154 (8th Cir. 1968).

5. *Boycott*: The Court of Appeals, again adopting the Board's view, emphasized that "labor strife" had occurred in the plant over food pricing (Pet. App., p. A16). The mere fact, however, that certain employees were disturbed enough by the price increase to boycott the food services cannot convert those prices into subjects of mandatory bargaining. As this Court held in *Pittsburgh Plate Glass, supra*, and in *Fibreboard Paper Products Corp., supra*, the Act establishes a limited list of mandatory bargaining subjects. The list cannot be expanded simply because certain employees are interested enough to undertake some form of economic action or, for that matter, file an unfair labor practice charge. If the boycott has any significance at all, it shows the availability to employees of alternative food sources.

6. *Number of unions involved*: That Ford would be obligated to bargain with only one union on food prices, a fact on which the Court of Appeals placed some reliance (Pet. App., p. A16), cannot expand the scope of the Act's mandatory bargaining requirements. Obviously, the statutory obligation to bargain does not depend on the number of unions involved, although, of course, as the courts of appeals perceived in *Westinghouse*, 387 F.2d at 549-550, and in *Ladish*, 538 F.2d at 1272, the existence of two or more unions in a plant makes bargaining over food prices all the more infeasible.

In sum, then, there is no valid basis for the Court of Appeals' conclusion that because of some factual circumstance unique to this case, Ford was required

to bargain about in-plant food prices. On the contrary, the facts of this case show that the in-plant food prices at Ford's Chicago Heights plant do not vitally affect employees' terms and conditions of employment, and that the Act's underlying purposes would not be served by such bargaining.

III. FORD WAS IMPROPERLY ORDERED TO BARGAIN ABOUT FOOD SERVICES.

The Board's order, which was enforced by the Court of Appeals, requires Ford to bargain with Local 588 "with respect to food services" (Pet. App., p. A29). However, neither the Board nor the Court in any way defined what was meant by "food services."

Thus, Ford would, under a literal reading of the Board's order, be required to bargain over trivialities which manifestly do not have a material or significant effect on employees such as, for example, whether the knives and forks be plastic or metal, whether coffee be served from a vending machine or at the cafeteria line or both. Thus, under the order as it now stands, Ford is exposed to the sanction of contempt for refusing to bargain over any matter that touches upon food services.

Moreover, nothing in the dealings between the parties lends meaning to the Board's order. Local 588's request for bargaining stated only that it was "concerned about . . . services in the cafeteria and vending operations" and "would like to bargain . . . regarding these . . . services" (Pet. App., p. A21). This unlimited and undefined request was refused by Ford; and now, without any elucidation of the scope of the bargaining that is required, Ford must necessarily comply with any bargaining request by Local 588 concerning food

services, however picayune or absurd the request might be.

Sound principles of administrative law, as well as fundamental fairness, demand that Ford be apprised with reasonable specificity of the subjects encompassed in the Board's direction that it bargain about "food services."⁵¹ As this Court stated in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 433 (1941):

It is obvious that the order of the Board, which when judicially confirmed the court may be called upon to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing.

The Board's order fails to meet the *Express Publishing* test; and, consequently, the Court of Appeals ought to have refused to enforce the Board's order. See also, *May Department Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945); *Communications Workers v. N.L.R.B.*, 362 U.S. 479 (1960).⁵²

51. Decided Board cases only touch upon bargaining about food services and do nothing to define the scope of an appropriate bargaining order in a case such as this. In *Preston Products Corp.*, 158 NLRB 322, 329, 345 (1966), enforced, 392 F.2d 801 (D.C. Cir. 1967), cert. denied, 392 U.S. 906 (1968), in addition to many other unfair labor practices, an employer was held to have violated Section 8(a)(1) of the Act by unilaterally improving lunch room equipment and supplies. Similarly, in *Flemming Mfg. Co.*, 119 NLRB 452 (1957), the employer was found to have violated Section 8(a)(1) by unilaterally discontinuing breaks at which employees received free coffee, milk and sugar without previously consulting with the employees' union.

52. The specific information requested by Local 588—Ford's maintenance responsibilities, profits, control of prices and contract with ARA—does not relate to food services but instead represents an attempt to determine Ford's role in food pricing.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and enforcement denied the Board's order.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement

reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

* * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect. . . .

* * * * *

(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order. . . . Upon the filing of such petition, the court shall cause

notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section. . . .